

KAUA'I PLANNING COMMISSION
CONTESTED CASE CALENDAR
December 13, 2016

The contested case calendar of the Planning Commission of the County of Kaua'i was called to order by Chair Mahoney at 10:01 a.m., at the Līhu'e Civic Center, Mo'ikeha Building, in meeting room 2A-2B. The following Commissioners were present:

Chair Sean Mahoney
Mr. Roy Ho
Mr. Wayne Katayama
Mr. Kimo Keawe
Ms. Glenda Nogami Streufert

Absent and Excused:
Ms. Kanoe Ahuna

The following staff members were present: Planning Department – Leslie Takasaki; Office of the County Attorney – Deputy County Attorney Peter Morimoto; Office of Boards and Commissions – Administrator Jay Furfaro, Commission Support Clerk Darcie Agaran

Discussion of the meeting, in effect, ensued:

CALL TO ORDER

Chair Mahoney called the meeting to order at 10:01 a.m.

CALENDAR

Petitioners Kirby B. Guyer and Milton Searles Motion to Disqualify Hearing Officer, Declaration Jonathan J. Chun; Certificate of Service (related to Application for a Use Permit, Special Management Area Permit and Class IV Zoning Permit on Property Situated at Hā'ena, Kaua'i, Hawai'i identified by Kaua'i TMK No. (4)5-8-012: 22 containing a total area of 11,827 square feet.

Petitioners John R. Hoff Trust and Lorna E. Hoff Trusts' Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Appeal Decision of Planning Director Relating to the Notice of Violation and Order to Pay Fines Related to Use Permit U-2015-28, Special Permit SP-2015-9 and Class IV Zoning Permit Z-IV-2015-29 on Property Situated at Lāwā'i, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 2-5-005: 080 CPR Unit 1 containing a total area of 1.032 acres. (contested case files CC-2015-18, CC-2016-7)

Petitioners Lloyd R. Fischer and Shirley E. Fischer's Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of Non-Conforming Use Certificate TVNCU #5003 for Property Situated at Kekaha, Kaua'i, Hawai'i, identified by TMK No. (4)1-3-001: 88 containing a total area of 12,453 sq. ft. (contested case files CC-2016-9, CC-2016-10)

Petitioner Todd Schirm's Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of TVNCU # 5138 (Hale Cook) for Failure to Renew for Property Situated in Wainiha, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4)5-8-009: 8 CPR Units 1 and 2 containing a combined total area of 11,250.0 square feet. (contested case file CC-2015-24)

Petitioners Brysone K. Nishimoto and Catherine J. Nishimoto's Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of TVNCU #1171 (Ivy's Place) for Failure to Renew for Property Situated in Wainiha, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4) 5-8-004: 26 containing 8.343 acres. (contested case fil CC-2015-23)

Petitioner Michael Chandler's Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of TVNCU # 4222 (Hale O Lani) Related to Special Permit SP-2012-1 for Failure to Renew for Property Situated at 3239 A Kalihiwai Road, Kilauea, Kaua'i, Hawai'i, identified by TMK No. (4)5-3-003: 45 containing an area of 74,923 square feet. (contested case file CC-2016-4)

Petitioners John Wark and Shannon Wark's Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of TVNC #4219 ('Anini Kai) related to Special Permit SP-2011-13 for Failure to Renew for Property Situated at 3525 'Anini Road, Kilauea, Kaua'i, Hawai'i identified by TMK No. (4)5-3-004: 29 containing an area of 13,608 square feet. (contested case file CC-2016-5)

Petitioners Parnell H. Kaiser and Michele L. Kaiser's Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Application for a Use Permit, Special Management Area Permit and Class IV Zoning Permit on Property Situated at Hanalei, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4)5-5-004: 15 containing a total area of 6,046 square feet. (contested case file CC-2015-15)

Petitioners Toni Sutherland's and Alta Management Services, LLC's Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to the Appeal of the Planning Director's Decision Related to the Notice and Order to Pay Fines for the Continued Operation of an unpermitted Vacation Rental for

Property situated in Hā'ena, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4)5-8-011: 59, Unit A, and containing a total area of 6,250.0 square feet (contested case CC-2016-8)

Motion to Disqualify Hearing Officer; Certificate of Service (related to Petition to Appeal of Planning Director; and Application for a State Special Permit, etc. (Consolidated Cases) by Michael Levy and Alexis Boilini, Trustees of the Levy-Boilini Living Trust (contested case CC-2015-14, CC-2016-1)

Petitioner's Steven and Eddi Henry Motion to Disqualify Hearing Officer; Certificate of Service (related to Petition for Appeal of Decision of Planning Director; and, Application for a State Special Permit, etc. (contested case file CC-2016-11)

Petitioner's William I. Cowern and Catherine F. Cowern Motion to Disqualify Hearing Officer; Certificate of Service (related to Petition to Appeal Decision of Planning Director; and, Application for a State Special Permit, etc. (Consolidated Cases) (contested case files CC-2015-17, CC-2016-2)

Petitioner Anthony S. Bardin Motion to Disqualify Hearings Officer; Declaration of Sommerset K.M. Wong; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to TVRNCU #1225 for Property Situated in Hanalei, Kaua'i, Hawai'i, identified by Kaua'i TK No. (4)5-5-010: 39 containing 5,654 square feet. (contested case file CC-2013-83)

Petitioner's Greg Allen, Sr., and Greg Allen, Jr. Motion to Disqualify Hearings Officer; Declaration of Sommerset K.M. Wong; Certificate of Service (related to Petition to Appeal of Violation and Levi of SMA Fines Involving Property Situate in Kīlauea, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4)5-3-007: 14, and containing a total area of 16,552.0 square feet. (contested case file CC-2015-4)

Chair Mahoney: At this time, could I get a motion for executive session?

Ms. Nogami Streufert: I move that the Planning Commission go into executive session.

Mr. Keawe: Second.

Chair Mahoney: It's been moved and seconded. Any discussion? All in favor say aye. (Unanimous voice vote) Or we could do a roll call. No? No need? Okay. Opposed? (None) Motion carried 5:0. So we will go into executive session.

The Commission entered into Executive Session at 10:02 a.m.
The Commission reconvened in Open Session at 11:02 a.m.

Chair Mahoney: Call the hearing back to order. We have some procedural issues.

Mr. Katayama: Chair Mahoney, at this time, I would like to disclose my working relationship with Attorney Jonathan Chun on the Kaua'i Economic Development Board as officers, as well as

several other working committees, and I do this at this time to avoid any appearance of improper hierarchy and also any suspicion on any bias. I feel that there is no conflict at this time.

Chair Mahoney: Okay, thank you. Do any of the parties object to this?

County Attorney Mauna Kea Trask: Chair, for the record, Mauna Kea Trask, County Attorney. On behalf of the Planning Department in the Guyer case, I don't have any objection and I've spoken with co-counsel, the rest of the Deputy County Attorneys, today and it's my understanding they don't as well. I would note for the record that intervenors in the Guyer case, Ms. Robeson and Ms. Diamond, are also present. I do not know if they have a position on it, and I'd ask that you'd...they have an opportunity to say whether or not. They have joined in the Planning Department's opposition to the motions before you today.

Chair Mahoney: Okay. Could you state your name for the record, please?

Caren Diamond: Good morning. Caren Diamond for intervenors.

Barbara Robeson: Barbara Robeson for intervenors.

Ms. Diamond: And we have no objection.

Chair Mahoney: Okay, thank you.

Ms. Diamond: You're welcome.

Barry Edwards: Mr. Chairman, Barry Edwards and Jim Bickerton on behalf of three (3) of your cases today. We don't have an objection.

Chair Mahoney: Thank you.

Greg Kugle: Mr. Chair, Greg Kugle on behalf of the...two (2) cases, Bardin and Allen. We have no objection.

Chair Mahoney: Thank you.

Jonathan Chun: And I think technically...Jonathan Chun on behalf of my clients. We have no objection, but I think you need that on the record, also.

Chair Mahoney: Thank you, Mr. Chun. Okay. At this juncture, are the parties willing to consolidate...?

Mr. Edwards: Actually, Mr. Chairman, that's why I'm sitting here. I'm Barry Edwards. We represent three (3) of the matters on your case calendar, but...Jim Bickerton is with me, and Gregory Kugle and Jonathan Chun represent all the cases on your contested case docket. We've talked back and forth with Mr. Trask, County Attorney's Office, and have, what I believe, is an efficient procedural proposal. Mr. Trask wanted you to sign-off on it or your committee [sic] to

sign-off on it, but if it's okay with you, I'll read the proposal which answers, I think, your question.

Chair Mahoney: Thank you. Yes, please.

Mr. Edwards: All pending motions to disqualify the Hearing Officer are consolidated for hearing purposes before the Planning Commission today. All documents, evidence, and testimony submitted to the Planning Commission shall equally apply to all of the consolidated cases. Subpoenas issued for any of the individual cases shall be deemed to be issued for all of the contested cases. Attorneys for the applicants or the petitioners will present their evidence, which will be subject to cross-examination by the County Attorneys and intervenors, if any. The County Planning Department will then present its evidence, which will be subject to examination by the attorneys for applicants, petitioners, and intervenors, if any. After all the evidence has been presented, each individual case will be called and then argued by those who've appeared in the case at issue. For us, there will be one (1) argument for three (3) cases. Attorneys for each side will work to avoid duplicative arguments and will use their best effort to argue their cases jointly on the evidentiary and legal issues that they believe apply to more than one of their cases. Incorporation or adoption of other attorneys' arguments will be permitted and is encouraged. Parties may request to submit proposed Findings of Fact, Conclusions of Law to the Planning Commission. That's the procedure that we would propose be adopted today, and I believe that Mr. Trask agrees. I know that the lawyers on our side of the table agree. We ask that you give it your blessing.

Chair Mahoney: Okay, thank you. Members of the Commission, the Chair will entertain a motion.

Mr. Katayama: Chair Mahoney, I move that the procedural outline as presented by the attorneys be accepted.

Mr. Ho: Second.

Chair Mahoney: It's been moved and seconded. Any discussion? Hearing none.

Mr. Katayama: Can we have that in writing?

Mr. Edwards: Actually, yes. I'm sorry I don't have it in writing, except on my draft today, but we'll get it in writing and get it to you.

Mr. Morimoto: So will the parties sign a stipulation to that effect?

Mr. Edwards: Yes.

Mr. Morimoto: Thank you.

Mr. Katayama: Thank you.

Chair Mahoney: Thank you.

Mr. Edwards: At least our side will. I'm not sure if Mauna Kea Trask (inaudible).

Mr. Trask: For the record, we did prepare a stipulation of fact and that was included, but I wasn't sure if you wanted procedure in the fact, so I thought I might've confused it. But we'll work with counsel to get a joint procedural stipulation.

Chair Mahoney: Okay.

Mr. Morimoto: With regard to the intervenors, can we get their position on the consolidation?

Mr. Trask: They are present, and just for the candor of the Commission, I did...intervenors did join in the Guyer case; that is the only case that they are participating in. It is my understanding that they will not be arguing today. They'll be joining the arguments that I will be making in the Guyer case, but, again, they are here to confirm that if you'd like that on the record.

Mr. Morimoto: Yes.

Ms. Diamond: Caren Diamond.

Ms. Robeson: Barbara Robeson.

Ms. Diamond: Yes, we do confirm that we're...we have requested for a joinder with the County, and our arguments are joined with the County's.

Mr. Morimoto: Do you agree to stipulate to the consolidation of the hearings for all of the motions that have been filed?

Ms. Diamond: Yes, we do.

Mr. Morimoto: Thank you.

Ms. Diamond: Thank you.

Chair Mahoney: Thanks. Okay.

Mr. Katayama: And because we don't have that in writing, just as a clarification, the Conclusions of Law, Decision and Order will be individually presented by each of the attorneys?

Mr. Edwards: What I had written and what we've discussed is that the parties may request to submit proposed Findings of Fact, Conclusions, etc. And that would mean that we, for our three (3) cases separately, may request to submit; that's my assumption across the board. I'm pretty sure the other lawyers agree.

Chair Mahoney: Okay. Is that...

Mr. Edwards: We're not going to be working that closely together at the end of this. (Laughter in background) Not that we don't like each other. (Laughter in background)

Chair Mahoney: Does that satisfy the discussion portion?

Mr. Katayama: Good. It's okay.

Chair Mahoney: So the motion on the floor was...a motion was made and seconded. No further discussion. All in favor say aye. (Unanimous voice vote) Opposed? (None) Motion carried 5:0.

Next procedural issue is the procurement code, and if I could ask the attorneys to point to the law that gives the Planning Commission the authority to consider procurement issues.

Mr. Trask: I think...for the record, Mauna Kea Trask, County Attorney. The parties...as Mr. Edwards has stated, we've been working as much as we can to facilitate the expeditious and fair process of today's hearing. So if I may approach, Chair, I do have the requisite one (1) original and twelve (12) copies of a Joint Stipulation of Facts that touch upon the procurement issues and the contracting issues as well as the original and twelve (12) copies of Planning Department's Exhibit List; both of which have been provided to opposing counsel. If I can approach and pass that out at this time, we can start there.

Chair Mahoney: Yes, you may.

Mr. Trask: Thank you.

Chair Mahoney: Thank you.

Mr. Trask: For the record, (inaudible) the Chair's request, I have handed out the original to Boards and Commissions Director [sic] and the remaining copies, and to yourselves as well. So just to put this on the...the Joint Stipulation of Facts before you was agreed upon and signed by all...counsel for all parties. I can read it into the record if you'd like, but it covers, generally, the contract and procurement process regarding this issue. There is a signature line for the Chair, so both parties request, I suppose, the Chair to sign this at the appropriate time, and then the Exhibits handed out – the Planning Department's Exhibits for the Consolidated Hearing on this Motion – are the related pertinent documents regarding the contracting and procurement. On behalf of the Planning Department, we would say that the Commission does not have the jurisdiction or authority to hear procurement questions, and as stated in our opposition filed by the Planning Department on or about September 12, 2016, we would argue that the Hawai'i Public Procurement Code has specific standing and exclusive remedy provisions, limiting challenges to bidders, offerors, and contractors as provided in District Council 50, International Union of Painters & Allied Trades versus Saito, and that, in brief, the petitioners and various respondents before you today were not an actual or prospective bidder, offeror, or contractor aggrieved in connection with the solicitation or award of the contract at hand. So that's one of our main arguments.

Chair Mahoney: Okay. So, do the applicants have any response?

Mr. Chun: Good morning. Jonathan Chun on behalf of my applicants and petitioners. I believe, at this point in time, rather than burden the Commission with legal argument...because this is a legal argument; it is not factual. I think it would probably be more beneficial for the Commission to understand the legal arguments in light of the facts that's going to be presented today because making a legal argument outside of the facts, I think, would be a bit difficult to understand. But if you want an argument, which I'm going to keep as short as possible, I believe one of the issues is going to be...one of the issues in front of the Commission is the fairness of the procedure, and the second issue, of course, is going to be based upon...and that is, is the fair based upon the procurement law. Now, how the Commission's going to decide the underlying issue of fairness and equitableness is for you to decide. But we believe...at least my clients' position is, for you to decide that properly, you need all the facts and all the rules that would be...you know, would play a part in it. So rather than argue, at this point in time, what those facts mean, without giving you an opportunity to really hear those facts and the witnesses, I propose that maybe we just leave that as final argument. I know what their argument is and I'm not here right now to argue one way or the other. I think the best way to do that is to present it in the context of the facts (that) are going to be presented to the Commission because ultimately, you're going to hear the legal arguments, anyway, at the end of the day. So I would propose that the better way to handle that issue is to just listen to the facts and listen to the arguments at the end of the day, and at the end of the day, when all the facts and all the issues are before you, you can...your, then, decision is whatever you think is going to be made a part of your rationale, or to uphold the motion or deny the motion. That's basically my position. I'm not too sure what the other counsels are going to be saying.

Mr. Morimoto: Mr. Chun?

Mr. Chun: Yes.

Mr. Morimoto: Just kind of a jurisdictional question, what is the source of the Planning Commission's authority to rule or make a determination regarding 103D issues?

Mr. Chun: I would believe...there's going to be testimony based upon the rules and the statute in terms of what the proper remedies would be.

Mr. Morimoto: Yes. Setting aside the testimony, what is the legal authority for the jurisdiction of the Planning Commission to make a determination as to the rightness or wrongness of a procurement issue?

Mr. Chun: The Commission's authority has to do with...they were the ones that actually appointed the Hearings Officer. They authorized the appointment of the Hearing Officer. That's in your...

Mr. Morimoto: Do you have a legal citation? We know what the...we know that you're going to get into the facts at some point in time, but the question is, what is the legal authority? Do you have a statute that you can point to?

Mr. Chun: I would prefer that these legal arguments be made at the end of the hearing when all the facts are presented.

Mr. Morimoto: Well, this kind of goes to whether or not we should even be considering this matter. So the question is...

Mr. Chun: Then I would object and I would object to trying to determine the appropriateness of the legal argument at this point in time without the facts.

Mr. Bickerton: May I address the panel?

Mr. Morimoto: Sure.

Mr. Bickerton: Morning. I'm Jim Bickerton. I'm counsel for Boilini, Cowern, and Henry. The question of this panel's jurisdiction to grant relief under the procurement code is not before you. It's not an issue in this case. I'm not suggesting...I don't think we suggest that this panel has the basis to enforce the procurement code; that's not something that we're asking the panel to do. However, it is relevant and important for you to make various decisions, and I'll use an analogy that may make it easier. Suppose that our motion was based on a contention that Mr. Kimura...let's say there was a regulation or a rule that you had that said a Hearing Officer must be a licensed attorney, and we determined through investigation that Mr. Kimura had never passed the bar. I don't mean to besmirch his name. I'm just using this purely as a hypothetical example. Obviously, the jurisdiction to enforce the rules against practicing law without a license, the Office of Disciplinary Counsel, the Supreme Court, they control those things, but you, as the Planning Commission, would get to decide whether or not he is qualified to serve the function that you have designated him to serve. By the same token, it is our position that if...what the remedies are under the procurement code, whether the contract should be cancelled, whether he should give the money back, and so forth, that is not before you and that is not the issue. The issue we're raising is, is he a qualified Hearings Officer, and the Planning Commission certainly has the jurisdiction to decide whether somebody's a qualified Hearings Officer. The qualifications are, in part, based on whether he was properly hired in the first place. But the question of whether or not he has a void or voidable contract is also relevant, factually, to the issues that Mr. Chun alluded to which is the fairness of the proceeding. When you have a Hearing Officer who has a sort of Damocles hanging over him that he could be cancelled at any time, that's a factual question that you can decide without enforcing the procurement code or not. You guys are a legal agency, you get to review Hawai'i law, and make determinations on that law. Whether you can, then, enforce the law in certain ways is a different question, but you always have the jurisdiction to decide a question of law that is raised by the case presenter.

Mr. Morimoto: What gives the Commission the authority to determine whether or not a contract is void under the procurement code?

Mr. Bickerton: The law of Hawai'i, which you folks apply.

Mr. Morimoto: Which particular statute are you referring to?

Mr. Bickerton: Its Chapter...is it 104?

Mr. Morimoto: 103D?

Mr. Bickerton: 103D.

Mr. Morimoto: What particular section are you referring to, Mr. Bickerton?

Mr. Bickerton: That gives you jurisdiction? Or...

Mr. Morimoto: Yes.

Mr. Bickerton: There is no section of the code that gives you folks jurisdiction to decide a legal question and there's certainly no section that gives you jurisdiction to enforce the code. But to decide whether or not someone is a qualified Hearing Officer, I don't think you folks can appoint him in the first place if he doesn't meet qualifications. So obviously it would be...if you're saying you don't have the ability to...

Mr. Morimoto: No, I'm asking you, what particular section of the procurement code gives the Planning Commission the authority to determine whether or not a contract is void?

Mr. Bickerton: There is none.

Mr. Morimoto: Thank you.

Mr. Bickerton: This Planning Commission has the jurisdiction to make legal analysis and determinations as relevant by the issues raised. I've articulated one of them, but there are a couple others as well.

Chair Mahoney: Thank you. Could we hear from (the) County Attorney?

Mr. Trask: Thank you...

Mr. Kugle: I would like to make a few comments.

Chair Mahoney: Oh okay.

Mr. Kugle: Thank you, Chair. Greg Kugle on behalf of movants Allen and Bardin, and I would add to what's been stated. First off, it's your own Planning Commission Rule 1-6-1 that provides that a Hearing Officer has to be duly appointed and designated to preside at a hearing, and I think that's the basis under which this Commission, or its predecessor, members appointed Mr. Kimura or approved of him or at least initially approved of the original Hearings Officer Richard Nakamura. So the Hearings Officer has to be duly designated under your own rules, and so that's you enforcing those rules. Then I would...

Mr. Morimoto: Excuse me. The rules that you're talking about are the Planning Commission rules, correct?

Mr. Kugle: Correct.

Mr. Morimoto: So where in the Planning Commission rules does it state that we have the...or the Commission has the authority to rule on procurement issues?

Mr. Kugle: Well, I think when it says that a Hearings Officer duly appointed and designated shall preside at a hearing, that...implicitly, that's a requirement that this Commission must have decided that that Hearings Officer has been duly appointed and designated. It is your responsibility to make sure that the person that you're appointing to conduct these hearings is doing so with the trappings of law; in other words, is authorized to do so.

Mr. Morimoto: So anytime the Commission has to appoint a Hearings Officer, we have to determine whether or not the procurement code has been complied with. Is that what you're saying?

Mr. Kugle: Implicitly, yes, you must. And I would say the very argument that Mr. Trask enunciated, which is the procurement code somehow sets apart a separate procedure that divests this body of jurisdiction, was soundly rejected in the case Sierra Club versus the Land Use Commission in 2013, a Hawai'i Supreme Court case, the citation of which is 132 Hawai'i 184. And while that case was not a procurement code case, it raised, on all fours, the situation that this Commission is presented with. That case involved the Koa Ridge Land Use Commission decision, which has been in the newspapers recently as well when it was approved. But in that case, Commissioner Kanuha, one of the Land Use Commissioners, had not been approved for a second term by the Senate. He, then, went ahead and voted on the Land Use Commission petition approval at the hearing; in other words, the same situation as here, there was a motion made to disqualify him saying he was not competent to serve. The Land Use Commission itself reaffirmed his position, but that was an issue taken up on appeal. Ultimately, the Hawai'i Supreme Court said...agreed with the movants that he should have been disqualified because he had not been confirmed by the Senate for the second term. But to the Deputy County Attorney's question, the argument was made in that case by the Land Use Commission's attorney and the Developer's attorney that the...that there's a statute, a quo warranto statute, which is a Latin term for a law that means by who's authority is a person acting, and the Land Use Commission had said that that was the only remedy that the Land Use Commission and therefore the courts had and in an administrative appeal, Chapter 91 appeal, out of a contested case hearing, they said the courts couldn't consider that question. They had no jurisdiction, just as the Land Use Commission had no jurisdiction. The Hawai'i Supreme Court easily did away with that, said that was a proper question to be raised to the Land Use Commission when the Commissioner was asked to disqualify himself and the Commission was asked to disqualify the Commissioner, and then ultimately, it was available for the Circuit Court on the appeal, the ICA, and then the Hawai'i Supreme Court to consider that very question. So the Land Use Commission wasn't divested of jurisdiction just because there's a separate statutory scheme, just as this Planning Commission is not divested of jurisdiction. Because at the end of the day, the challenge here is not to the original procurement. Nobody in any of the motions has taken issue with whether

Richard Nakamura was properly retained, and so there was no reason to challenge an original procurement. This is how Mr. Kimura came to take his place and preside over these cases, and so that's a completely different issue than the original procurement that was done in 2011. That's my comments. Thank you.

Chair Mahoney: Thank you.

Mr. Trask: For the record, Mauna Kea Trask, County Attorney. Unless opposing counsel has any more arguments, we'd like to address what has been stated so far.

Chair Mahoney: Is there (anything) further from the opposing counsel? No. You have the floor.

Mr. Trask: Thank you. So first off, we would...and it is my understanding that opposing counsel...we've circulated the...in order to contextualize this argument and provide some of the facts that we believe are relevant, we would move the Planning Department's Exhibit List, as submitted both to opposing counsel and the Commission, into evidence at this point so we can address the matters contained therein because they do touch on this very subject. So we'd make that motion at this time.

Chair Mahoney: Make a motion to... Could you repeat that a little bit louder, please?

Mr. Trask: We would just move the Exhibits -- this is A through T, as in "Tom" -- as provided by the Planning Department into evidence for the purpose of today's proceeding.

Chair Mahoney: Okay. Do we need a motion?

Ms. Nogami Streufert: I move to accept...

Chair Mahoney: No, we don't. We don't need a motion.

Ms. Nogami Streufert: We don't need a motion?

Mr. Morimoto: Well, you can move to accept, then, I guess.

Chair Mahoney: Move to accept, yeah. Okay.

Ms. Nogami Streufert: I move to accept the Exhibits A through T that were submitted by the Planning Department.

Mr. Keawe: Second.

Chair Mahoney: Moved and seconded. Any discussion? Hearing none. All in favor say aye. (Unanimous voice vote) Opposed? (None) (Motion) carried 5:0. Thank you.

Mr. Trask: Thank you very much. And so on behalf of the Planning Department...first off, counsels' arguments regarding what are the issues today, according to their motions, this is in

Paragraph 3, at least in the Guyer motion to disqualify, it says that since Mr. Kimura's selection was not done in accordance with HRS Chapter 103D, his contract is voidable and he does not have the proper authority to hear this matter. So we would say that the movant's legal argument is very much whether or not you have the authority under 103D to void his contract. And now, regarding the arguments related to Rule 1-6-1, if you look at...this is Exhibit...so beginning with Exhibit Q, this is the Planning Commission minutes from the Regular Meeting January 13, 2015. If you look at Page 13 therein, Paragraph 2, this is the top of the page...let's see. Oh, I'm sorry, 5th paragraph. So 5th paragraph, beginning with "Mr. Dahilig". This is right in the middle of the page. Mr. Dahilig stated that as clerk of the Commission, he circulated a memorandum asking for delegation of authority to obtain a Hearings Officer to serve on behalf of the Commission to hear motions, receive evidence, and provide a recommended Findings of Fact, Conclusions of Law, Decision and Order for the Commission's entertainment. Stipulated to the request he would report back to the Commission regarding the ability to secure a Hearings Officer. The other option would be for the Commission to handle the contested case hearing. So that was the motion before this body on the 13th of January 2015. If you look, on the last bold paragraph, upon motion by Jan Kimura, seconded by Louis Abrams to delegate authority to the clerk of the Planning Commission to obtain a Hearings Officer to serve...etc., a Hearings Officer was appointed. You moved to send this case to the Hearings Officer. So that was the exercise of your jurisdiction under 1-6-1. 1-6-1 does not say anything about procurement. It's your decision whether or not to handle this yourself, and therefore the presiding officer be the Hearings Officer, or you would delegate your lawful authority under the rules to a Hearings Officer; that decision was made. We would note that the record is entirely devoid of petitioners objecting to that. They had an opportunity, they were present, they did not object to taking that action.

If you look at Exhibit R, and this is the Commission minutes from January 27, 2015, Page 6, 4th paragraph. Mr. Dahilig noted that they are making progress to procure and appoint a Hearings Officer. They currently have approvals for money transfers (with) the budget to fund the hiring and they will be relying on the Deputy County Attorney – at that time, Ian Jung, your Commission counsel – to handle the procurement hiring. They will not execute any of the contracts until such time as this particular matter is resolved. So the clerk of the Commission had stated at that time that...and the Commission had adopted, at the very least, indirectly the fact that your counsel was doing that on your behalf. As we all know, attorneys can represent their clients, and so that was (inaudible) that was taken.

And as far as (inaudible) and Sierra Club, Mr. Kugle is right. Sierra Club has absolutely nothing to do with procurement. It has absolutely nothing to do with 103D. What they have is...Sierra Club has to do with is the ability for someone who was not appointed as a Commissioner to hear, and that makes very much sense. If you're supposed to be confirmed by the Senate and you're not and you still sit on the Commission, well then that's an issue. But what we're dealing with here is, as movants state, they're saying that Kimura's selection was not done in accordance with 103D. This has nothing to do with you or whether or not anyone was confirmed by the Senate, so it's a false analogy argument we would argue. This is very much a jurisdictional question as recognized by your counsel. If they're waiving that argument, then we really don't have to discuss the procurement matters, although we would note that the Joint Stipulation of Facts gives you the entire recitation of the history of the procurement, the dates upon which the contracts

were entered into, the scope of the contracts, the ability to sign under those contracts, who signed these contracts and assignment agreements. It's all right here.

Maybe we can just move on, then, to their second argument, which is whether or not Mr. Kimura is paid out of the fines account or if he's paid out of the General Fund account; also, which is not your kuleana. And if you want, we can read the Joint Stipulation of Facts into evidence to contextualize all these arguments. I'd be happy to do so.

Chair Mahoney: Okay. Let's see.

Mr. Trask: Or you can have...if it'd be more...if anyone would object to that, Planning Department would not object to a member of the Commission or Boards and Commissions to read the Stipulation of Facts as such so as to ensure its read fairly.

Chair Mahoney: Okay. Excuse me. Could you repeat that again? I'm sorry.

Mr. Trask: Oh, just the last bit, we do have a Joint Stipulation of Facts.

Chair Mahoney: Right.

Mr. Trask: And if...as Mr. Chun said, he wants to hear the facts first, but we have eighteen (18) paragraphs of facts at your disposal. We would not object to them being read in the record by Boards and Commissions Staff or yourselves in order to ensure that they are not being inappropriately read by myself. I can dramatize sometimes.

Chair Mahoney: Okay. How would we like to proceed?

Mr. Morimoto: Do the parties require that the Stipulation be read into the record?

Mr. Bickerton: No, as long as it's (inaudible).

Mr. Morimoto: It will be made a part of the record, yes.

Chair Mahoney: So it could be read into the record by the clerk or the...?

Mr. Morimoto: It's not required.

Chair Mahoney: It's not required. Okay. Alright. Now, where did that leave us? On the...

Mr. Morimoto: So given the stipulation, is this comprehensive or are you going to take additional testimony, or try to introduce additional evidence with regard to the procurement issue?

Mr. Chun: We have additional witnesses.

Mr. Morimoto: Regarding the procurement issue?

Mr. Chun: Yes.

Mr. Morimoto: Can you make an offer of proof with regard to that?

Mr. Chun: We have witnesses that will testify as to the appropriateness of the assignment of the contract from the Ayabe Firm to Mr. Kimura.

Mr. Morimoto: And who are these witnesses?

Mr. Chun: We have Lloyd Unebasami, who was the former Chief Procurement Officer of the State of Hawai'i and who also assisted in the drafting of the original rules that is being relied on by the County of Kaua'i.

Mr. Morimoto: Is that it? Any additional witnesses?

Unidentified Speaker: (Inaudible)

Mr. Chun: On the procurement?

Mr. Morimoto: No, no, just on the procurement code issue.

Mr. Chun: On the procurement, right?

Mr. Morimoto: Yes.

Mr. Chun: Right. In addition to that, I will have...we will have Jodi...unless there's a stipulation. I have been trying to get a stipulation from the County Attorney's Office regarding the documentation of...in the procurement and the contract files. But absent a stipulation of what the contents of the procurement and the contract files contain, I will call additional witnesses to confirm that there are no resumes or applications filed by Mr. Kimura for those contracts. In other words, he never applied for it and he never provided the County of Kaua'i with any resumes showing what his qualifications are. And also, I would present...I believe the witnesses that will be called will testify that they did not select Mr. Kimura and somehow his name magically got assigned the contract, but we don't know. I mean, again, that's why I've offered to try to have a stipulation as to those facts without calling the witnesses; however, I don't believe the County was willing to stipulate to those facts, so those witnesses...

Mr. Morimoto: Yeah, what the County was or was not willing to do...

Mr. Chun: Right, so I'm just saying...

Mr. Morimoto: The question is, what's your offer of proof?

Mr. Chun: So those witnesses will testify, and I think the Commission needs to know that Mr. Kimura at no time applied for the position; at no time, I believe, ever submitted a resume; and at no time was any resume or qualifications of Mr. Kimura reviewed.

Mr. Morimoto: So your intention is to call Lloyd?

Mr. Chun: I already said Lloyd. There's Jodi Sayegusa. I believe Ernest Barreira will be called because he signed off on some of them. He was the Assistant Chief Procurement Officer. And I think those...and Myles Hironaka.

Mr. Trask: And Chair, if the Planning Department may make its record in regards to the offer of proof as provided by Mr. Chun.

Chair Mahoney: Yes.

Mr. Morimoto: Yes.

Mr. Trask: Thank you. We point you to the Joint Stipulation of Facts; Page 8 beginning at Paragraph 10. First off, before we begin, I've been informed by my client that – I forget his last name – but that Lloyd is actually present in the hearing right now. I don't know what he looks like, but we believe that he should have been excluded via witness exclusionary rule.

Mr. Morimoto: Yes. If there are any witnesses who are going to be testifying during the hearing aside from the parties, we'd ask that they be...they remove themselves from the room.

Mr. Trask: So first off, the Planning Department has no notice of who...that Lloyd was going to be called today, and to our knowledge, he had not participated in any way in the procurement whatsoever. We would say that anything he...it looks like he would be some kind of...if he was working with the State, he had nothing to do with the County of Kaua'i's procurement under 103D. The Chief Procurement Officer of the County is usually the Director of Finance, depending, so we don't think that an appropriate offer has been made as to the relevance of his testimony, unless he's just going to talk about 103D in general, which, again, if their argument isn't related to 103D, we don't see the relevance of...at all.

However, going back to the Page 8, Paragraph 10, it states as follows, Section 10 of both Contract Nos. 8599 and 8741, provide that "the Consultant – who, at that time, was Mr. Nakamura – shall not assign any interest in this contract, and shall not transfer any interest in the same, whether by assignment or novation, without the prior written consent of the County." 11. Contract No. 8599 was signed and approved by the following persons; as to form and legality by Deputy County Attorney Jodi Higuchi Sayegusa as required by the Kaua'i County Charter section 19.18 A; Wally Rezentes, Jr. signed as Director of Finance as required by Kaua'i County Charter section 19.18 B; and Richard Nakamura signed as Consultant. Contract 8741 was signed and approved by the following persons; as to form and legality (by) Deputy County Attorney Ian Jung as required by the Kaua'i County Charter 19.18 A; Sally Motta, Deputy Director of the Department of Finance signed on behalf of Director of Finance as required by Kaua'i County Charter section 19.18 B; and Michael A. Dahilig, Planning Director signed to recommend for approval; and Richard Nakamura signed as Consultant. Going on to Page 9, Paragraph 15...oh, I'm sorry, 14, Contract Nos. 8599 and 8741 were both assigned on April 21, 2015. The assignment of these contracts was performed under the authority of section 10 in both contracts, as well as, Hawai'i Administrative Rules, HAR, 11-125-14 (2).

We would direct your attention, now, to the Planning Department's Exhibit List. The assignment of Contract 8599 is provided as Exhibit I, and the assignment of Contract No. 8741 is Exhibit P, as in "Paul".

Paragraph 15 of the Stipulation of Facts – the Assignment Agreements for both Contract Nos. 8599 and 8741 provide that, "it has become necessary for the Consultant to assign this contract due to alleged conflicts of interests raised by various parties engaged in administrative litigation before the Planning Commission as the Consultant has previously defended the County in other matters." 16. Both Assignment Agreements provide that, 2. The assignee hereby accepts this assignment and agrees to perform all the consultant's duties, responsibilities, and obligations under the Contract; and, 5. The contract warrants that it has no...or the consultant warrants that it has no knowledge of any existing or potential claims against the consultant with respect to this contract. 17. Both Assignment Agreements were signed by the following persons: Deputy County Attorney Ian Jung, as to form and legality, as required by Kaua'i County Charter section 19.18 A; Director of Finance Ken Shimonishi, as required by Kaua'i County Charter section 19.18 B; Michael Dahilig Director of Planning recommended for approval; Richard Nakamura as Consultant; and Harlan Kimura as Assignee.

And just as an offer of proof, I spoke with Ms. Higuchi Sayegusa, as well as Mr. Jung, related to this and according to the information that I have been provided, Ms. Higuchi Sayegusa did not take part in this assignment as provided for in the facts. It was Ex-Deputy County Attorney Ian Jung, so I don't think Jodi would have anything to provide to you today. It would, in fact, be Mr. Jung.

Chair Mahoney: Thank you.

Mr. Trask: And so I guess the effect of all of that would be those offers are either irrelevant or covered by facts and circumstances provided before you already.

Chair Mahoney: Okay, thank you. Alright. We'll move forward. Our next issue...

Mr. Morimoto: Excuse me. Procedurally, how are the parties going to proceed? Will one (1) attorney be speaking on behalf of all of the movants? No? So you will all, I guess, take turns in questioning witnesses, etc.?

Mr. Chun: Do you want us or you want (inaudible) to answer?

Mr. Morimoto: Well, either...both.

Mr. Chun: I believe the stipulations say that each party will be allowed to question witnesses and to cross-examine, but I think, also, the stipulation said that the parties are going to work as best as they can to avoid repetition and repeating questions and arguments. That's the best we could've done working with the parties, but I think the intent is to streamline it as much as possible.

Mr. Morimoto: So the four (4) witnesses that you identified, will they also be witnesses called by your co-counsel?

Mr. Chun: I don't know. I haven't talked to them about that. I think the agreement between everyone was we're going to work as best as possible to avoid duplicative questions and issues, so I think what I'm going to be...if I'm calling witness, I think I'll ask whatever questions that I believe from my clients' perspective should be asked, but I can't speak for what questions that they would ask. I think all of us just agreed that we're going to avoid any kind of duplication.

Mr. Morimoto: Thank you.

Chair Mahoney: Seeing it's close to the lunch hour, 12:00 (p.m.), if we could break for lunch and return at 1 o'clock.

Mr. Trask: No objection from the Planning Department.

Mr. Chun: No objection on that. I just want to know, if we're going to be breaking for lunch, what is the next process? Are we going to be calling witnesses? Or what is the next step?

Chair Mahoney: We'll go into the evidentiary portion and witnesses; you can call witnesses.

Mr. Chun: Okay. So I think what was asked of me before was which witnesses I was going to call first. I don't think the Deputy County Attorney was...I think Mr. Mauna Kea asked me this, and I just wanted to, you know, present that, but I thought...what I was going to do, just to let the Commission know, I was going to call Jodi first, Myles second, and I believe there was going to be a stipulation that Ken Shimonishi was not going to be needed to be called because the County was going to stipulate that Mr. Shimonishi would be deferring to whatever...the testimony of Mr. Barreira. Correct?

Mr. Trask: Well, on that point, we would request the honorable Commission make a ruling as to our objections to calling (Mr.) Unebasami as well as Ms. Higuchi Sayegusa. Given the facts and circumstances, it appears that the information sought to be known, although rules of evidence don't comply, the witness with firsthand knowledge and who, therefore, would be competent to provide you the information would be Ex-Deputy County Attorney Ian Jung. And I would like to know that because I would have to contact him to come over from Belles Graham. Beyond that, I can stipulate that Mr. Shimonishi has no firsthand knowledge of the issues presented; that Mr. Barreira is the Head Purchasing Director and would know about the procurement process. However, again, as provided for in the exhibits as I stated earlier, on January 27, 2015, it was made clear to this Commission that Deputy County Attorney Ian Jung was handling the procurement, and so it looks like everything is pointing to the Ex-Deputy.

Mr. Morimoto: Okay. Mr. Chun, with regard to Mr....how do you pronounce his last name?

Mr. Chun: Unebasami.

Mr. Morimoto: Unebasami?

Mr. Chun: Yeah.

Mr. Morimoto: Can you give us an offer of proof as to what he would be testifying about or...? Is he testifying as an expert witness?

Mr. Chun: I believe he'll testify as a...as the proper procurement process to be followed under 103D and also under the rules. The rules itself were cited. As the County Attorney has indicated...has cited, in front of the Commission, what rules they were relying on. So on one hand they're saying it's not relevant and on the other hand...

Mr. Morimoto: Mr. Chun, Mr. Chun, the question is, what is Mr. Unebasami going to be...

Mr. Chun: He will testify as to the procurement process under State law and its regulations; specifically under...

Mr. Morimoto: And the validity of the County's process? Whether or not the County followed proper procedures under 103D?

Mr. Chun: Yes.

Mr. Morimoto: Thank you.

Mr. Chun: I mean, again, the argument was on one hand the County's saying that the 103D...

Mr. Morimoto: Mr. Chun, thank you.

Mr. Chun: ...is not relevant and the other hand, they're stipulating it.

Chair Mahoney: (Inaudible) we can reserve the arguments for afterwards, okay?

Mr. Chun: Okay. So in other words, just to clarify, then I guess the County Attorney wanted to know for sure, what is the process that we are going to be following, and that's the question I began. Are we going to be calling those witnesses or not?

Mr. Morimoto: I think the Commission wants to make that ruling after lunch.

Mr. Trask: Thank you.

Mr. Morimoto: Thank you.

Chair Mahoney: We'll return at 1 o'clock. Thank you.

The Commission recessed this portion of the meeting at 11:53 a.m.
The Commission reconvened this portion of the meeting at 1:03 p.m.

Chair Mahoney: Call the hearing back to order. At this time, I think it might be appropriate to go into executive session for...to discuss (what) transpired before our lunch break.

Mr. Katayama: I move we go into executive session to refer to our counsel regarding the witness list as well as some of the positions on the procurement process as it applies to the Commission.

Mr. Ho: Second.

Chair Mahoney: It's been moved and seconded. Any discussion? Hearing none. All in favor signify by saying aye. (Unanimous voice vote) Opposed? (None) Motion carried 5:0. Thank you. We'll go into executive session.

The Commission entered into Executive Session at 1:04 p.m.
The Commission reconvened in Open Session at 1:21 p.m.

Chair Mahoney: We'll call the hearing back to order. At this time, we are going to move forward and we are going to proceed with no exclusion on the issues...or on the witnesses. So we're going to...testimony...

Mr. Trask: Chair?

Chair Mahoney: Yes.

Mr. Trask: For the record, Mauna Kea Trask, County Attorney. May I please...in all due respect to the Commission's order and authority, that's fine. I would like, however, at this time, on behalf of the Planning Department, to make an oral motion pursuant to Rules of Practice and Procedure of the Planning Commission Rule 1-6-16 (b), which provides that for good cause shown, the Commission may allow oral motions to be made during a contested case hearing. At this point, pursuant to 1-6-1 (b), which provides in relevant part, the Presiding Officer shall control the course of a hearing, administer oaths, receive evidence, hold appropriate conferences, etc. and take all other actions authorized by law that are deemed necessary to the orderly and just conduct of a hearing. And furthermore, pursuant to 1-6-17 (a), which provides in pertinent part, the Commission shall not be bound by the Hawai'i Rules of Evidence relating to the admission or rejection of evidence, but may exercise its own discretion in such a manner with a view towards insuring that justice is served. At this point, we'd offer that the Planning Department has had absolutely no prior notice of Mr. Unebasami being called today. He's being proffered as an expert witness. It was made clear during prehearing conferences with Mr. Kimura that although not bound by the rules of court or evidence, that the Hawai'i Rules of Civil Procedure would be followed as a guide. We worked for approximately three (3) weeks on the stipulation exhibits here. As you've seen today, the Planning Department has operated in good faith. We prepped and drafted the Joint Stipulation of Facts. We provided all the evidence. We got a notice that the letter, pursuant to the subpoena rules, was written to yourself asking for a subpoena authorization. He's being called as an expert. We believe, under the procurement code, we need to talk with our Procurement Officer to prep them to talk about these overarching procurement issues, the interpretation of the law, the authority of the County Chief Procurement Officer as opposed to the State Administrator, I believe, or Policy Board; it's still not clear. We

think that the just orderly process of this and we maintain that's all we've ever wanted. We want these proceedings to be held on the merits and to look at the issues at hand. We think that the surprise witness on hearing day, which has been pending for months – in fact, I think (inaudible) continued once or twice – shows unfairness and injustice to allow the interview of that witness today without allowing us to prepare or even know what it's about. So we make that motion at this time. And I'm sorry, we would've prepared it in writing, but, again, we had no notice, so it has to be oral.

Chair Mahoney: Okay. Could we have a response from the other...?

Mr. Chun: Good afternoon. Jonathan Chun. In response...just in response to the motion, one, there are no rules involving...regarding the witnesses and exhibits (inaudible). We were talking for the past three (3) months regarding stipulations and one of the stipulations I did ask for from the County was stipulations regarding the compliance with the section of the HAR, which is the Hawai'i Administrative Rules, regarding the assignment of contracts. I submitted specific stipulations asking them for that and unfortunately, the County has refused or declined to enter into those stipulations. Based upon the County's refusal to enter into those stipulations that I proposed, that would have taken care of the need for calling a witness, I needed to call a witness. So I don't believe it's a surprise. We've always taken the position...in fact, it's in our memo on terms of what we believe are the violations or the improprieties, I guess, of the hiring of Mr. Kimura. It's always been there. It's never a secret. They've always identified their witness Ernest Barreira to testify that it was done properly. He submitted an affidavit. So now they're saying...I don't believe it is accurate, but the County is saying we didn't know it was an issue. They knew it was an issue. They have identified, already, as a witness in theirs, Ernest Barreira. They submitted an affidavit.

Mr. Morimoto: Mr. Chun, when did you know that this person was going to be a witness for you?

Mr. Chun: We've...when the County declined to enter into our stipulations.

Mr. Morimoto: When was that?

Mr. Chun: I think it was last week Friday or Thursday.

Mr. Morimoto: Did you notify the County that you intended to call this person?

Mr. Chun: No.

Mr. Morimoto: Why not?

Mr. Chun: Why?

Mr. Morimoto: Fairness.

Mr. Chun: It's fairness. The issue was there. As I was just trying to explain to the...in response is that the issue has always been there. Who I call as a witness to support a proposed stipulation that I wanted to ask them to do is my call. I don't believe there's any rule in the Planning Commission Rules, and, in fact, if they wanted to know who the witnesses, Mister...the County could have easily said hey, could I have a witness list? They never gave us their witness list, but I never asked, you know? Could I have a...in fact, even as of last week, I was asking them would you stipulate to the documents that they brought in? I didn't hear anything, so I made my own copies. I don't complain over there in terms of hey, how come you didn't agree to stipulations when I submitted? It's...so, I mean, it's not...it's like they're unfair. It's not like they were taken by surprise. They knew the issues were there. I always disclose the issues. The issue was there. Now, whether they elect to act on the issues that I disclosed to them and talk to their own witnesses about those issues, is their kuleana, not mine.

Mr. Morimoto: So, again, can you give us an offer of proof as to what your witness would be testifying about?

Mr. Chun: I believe I already testified to that and I offered the proof already, Mr. Morimoto.

Mr. Morimoto: Yeah. Refresh my recollection.

Mr. Chun: No. I want the record to reflect Mr. Morimoto has also written me a letter indicating that our firm should be disqualified and I believe (inaudible).

Mr. Morimoto: Mr. Chun, that is a total mischaracterization of my letter.

Mr. Chun: Could I finish? Mr. Chair, could I finish? Mr. Mahoney?

Chair Mahoney: Well, you know what, I think we're going way off track here on your response, and...

Mr. Trask: If I may briefly. Maybe this is my fault. I'll take responsibility for this. I haven't made it very clear. As I said before, the issue was procurement and payment, essentially, as articulated in the movants' motions. I want to avoid name-calling, and I didn't use the term "bad faith". Just, pursuant to the standards under the rules, justice, okay? The issue has always been procurement.

So if you look at...and I did a quick and dirty research during the lunch break because that's all the time I was afforded. But if you look at 103D 204A, it says, the...this is...there shall be a State Procurement Office, placed for administrative purposes. This is the establishment of the State Procurement Office and the Administrator. The Administrator shall be the Chief Procurement Officer for those governmental bodies of the executive branch as provided in section 103D-203 (a) (8). 103D-203 (a) (8) provides that the Chief Procurement Officer for each of the following State entities shall be, (8), the remaining departments of the executive branch of the State and all government bodies administratively attached to them. The Administrator of the State Procurement Office of the Department of Accounting and General Services. Under 103D-203, it provides -- this is (b) -- the Chief Procurement Officers for each of the several counties

shall be, (3), the Honolulu, Kaua'i, and Maui boards...or, I'm sorry, (b) (1), the executive branch, the respective Finance Directors of the several counties, except as provided in Paragraphs (3), (4), (5); and that's the legislative branch, Department of Water, and the Public Transit Agency. You look at authority of 103D-205, the authority and duties of the Chief Procurement Officer, for their respective jurisdictions – that's, in this case, Kaua'i – and unless otherwise specifically provided for in this chapter, each Procurement Officer shall serve as the Central Procurement Officer and shall procure or supervise the procurement of all goods, services, and construction; exercise general supervision and control over all inventories of goods; sell, trade, otherwise; and then it goes on. However, if you look at 103D-207, except as otherwise provided in relevant part, all rights, powers, duties, and authority relating to the procurement of goods, services, and construction – in this case, services – now vested in, or exercised by governmental bodies of the State and counties are hereby transferred to the respective Chief Procurement Officers. And then the delegation of authority by the Chief Procurement Officer says – 103D-208 – subject to rules of the Policy Board, each Chief Procurement Officer may delegate any authority or duty conferred upon the Chief Officer by this chapter to designee or any department, agency, etc.

So my motion is based upon, one, the fact not knowing Mr. Unebasami was being called, and, two, in all due respect and in compliance with this Commission's order to allow his testimony, I need, now, to be able to deal with an issue where...and I maintain...for the record, we don't think it's relevant, but given the ruling, I need to go talk about these overarching procurement issues because we're not ready to talk about general procurement structure today; only this one (1) specific procurement. And given the ruling by the Commissioner, I think...take them out of it, take the movants out of it, fine. Just the ruling of this Commission, I would like the opportunity, in all due respect, just to prep – that's all – for the fair, expeditious, and justice-oriented proceedings of today because I don't want to go out willy-nilly. I don't want to be irrelevant. I don't want to ask inflammatory or non-material questions. So let me take responsibility for this and just allow me a continuance, please. That's all.

Mr. Chun: If I may, Mr. Chair?

Chair Mahoney: Yes.

Mr. Chun: If he's asking for a continuance after today...maybe I misunderstood. If he's asking for a continuance after today, we're not objecting to that. I thought he...maybe...are you asking for a continuance of the whole proceeding so nothing happens today and we just come back again?

Mr. Trask: Yes.

Mr. Chun: Okay. That I would object to. I mean, if he's saying take your witnesses, take your evidence, but I need more time to call my own witnesses later on to respond, that's fine. We have no objections to that. That would give him an opportunity to prep his witnesses and to educate the Commission itself in terms of what his issues are. We're not opposed to that. But, you know, at this point in time, we have witnesses available, subpoenas were sent out, Mr. Unebasami is here, you know, he has sacrificed his time, voluntarily, to come over here, and so I

think that would be unfair for the Commission to not receive his testimony today for that. If the Department or the County needs more time, we don't have...I mean, I have no objections to that.

Mr. Trask: And we would just point out that under the rules, if you want to save Mr. Unebasami's time, maybe we can work...I didn't know that it was stipulate or I'll call (Mr.) Unebasami. It was stipulate to these facts, and I just didn't have any first-hand knowledge of this stuff; no one did that was litigating these cases. And so, in all due respect, we tried, we got all these documents, we've tried to work with everything we could. And if everything's going to be procurement, it's going to be relevant to every single attorney or otherwise who signed these documents. They're going to have to know whatever he knows, which I don't know, and if they want to save him time, they can provide a written declaration of his testimony. We can work it out if there's a stip. I just don't know what we're dealing with today, and I don't want to waste anyone's time. I think it's fair. That's all. And again, as was said earlier, if this is about fairness, well then let's just be fair.

Chair Mahoney: Right. Okay. Could we hear from the...?

Mr. Edwards: Barry Edwards on behalf of three (3) of the petitioners. I don't have any problem with a continuance. If he wants to continue the matter to explore these issues, so be it. Let's get it decided properly, and if he needs the time, great.

Mr. Morimoto: Mr. Kugle, do you have a position?

Mr. Kugle: Because I flew over from O'ahu, I would probably echo Mr. Chun's comments that I'm here today and I know Mr. Unebasami is also here. So I would advocate for using our time efficiently, getting him started. I think that the County will hear the testimony...I mean, they've, as Mr. Chun mentioned, they put in declarations of Ernest Barreira in opposition to these motions back in September, so the County procurement people have been giving evidence and have been...know what the issues are, and that's been teed up. They should be prepared, but if they aren't prepared to testify today, then I think, as suggested, we can make accommodations for that. Thank you.

Mr. Morimoto: And for clarification, Mr. Chun, I never asked for your firm to be disqualified. If you read the letter carefully...maybe you didn't read the letter. I don't know. The correspondence I received was from your partner. But I never asked for disqualification of your firm. I asked for compliance with the Rules of Professional Conduct. There's a big difference.

Mr. Chun: Mr. Chair, if I may?

Chair Mahoney: Yes.

Mr. Chun: I'm not going to argue with that. I'm just going to say the letter speaks for itself. I'm not going to argue the letter. I'm just saying (inaudible).

Mr. Morimoto: Mr. Chun, you affirmatively stated that I tried to disqualify your firm.

Mr. Chun: Could I finish, Mr. Chair?

Chair Mahoney: Okay, but...

Mr. Chun: I'm not arguing. I'm just want to say, I would agree...if I may? If that's enough, then that's enough. We can go on.

Chair Mahoney: Well, I think that's enough.

Mr. Chun: Okay, then that's fine.

Chair Mahoney: We're working way off the point here about a letter and...

Mr. Chun: Right, right. Right.

Chair Mahoney: Let's get more relevant to the proceedings that we're doing today.

Mr. Chun: Just one point regarding the facts. In regards to...there are communications between myself and the County in regards to the issues and the facts I would want to stipulate, and I would agree that Mr. Trask's response to me on those stipulations was I don't know that for a fact, I don't have any knowledge, and that's why I agree with...that's what he stated. But my response was well, I was anticipating that you would let the County Agencies and Officers know or ask them those questions. And that was my...and maybe that was wrong. Maybe that was...I shouldn't have thought that that was going to be shared, but all I wanted to point out is that those were the questions and the issues that I presented, and what I...in my stipulations, I was asking questions based upon the rule that was cited in their contract and asked specific questions regarding factors in that rule that was in there. So if those factors weren't stipulated, then I needed to get a witness to indicate to the Commission what those factors meant and how they are applied. That stipulation was not...was refused last week sometime. So based upon that, I had to make a decision whether to call a witness to testify as to those factors. Now, I anticipated that once I gave the County a heads-up that those were the factors that needed...that I was looking at in terms of the rules that they cited, that they would go and talk to their clients or their witnesses about those factors and whether I was off-base or not, but apparently they need more time. Like I said, I don't have a problem with giving their witnesses more time to look at those factors. It's just that we are here today and the Commission should hear the witnesses today. If they need more time because they need to call additional witnesses, that's not an issue with us.

Chair Mahoney: Okay. So...

Mr. Morimoto: Mr. Chun, would you be willing to bring your witness back for cross-examination?

Mr. Chun: In terms of free of charge or...?

Mr. Morimoto: You did say he was voluntarily appearing, so I'm assuming he is appearing free of charge, no?

Mr. Chun: Yeah. He is not charging for his time, but you're asking my clients, would they upfront the costs?

Mr. Morimoto: No. I'm not asking your clients. I'm asking you if your witness would be willing to appear for cross-examination.

Mr. Chun: Oh, yeah. The witness would be willing to come back. It's just that I don't know what his schedule is, and I know he has...scheduled to be out of country later on. I mean, not now, but I know he has travel plans, so that's another issue in terms of how you are going to schedule this. But in terms of his voluntarily being here, I don't think that's an issue with us either.

Mr. Morimoto: You want to take a quick recess and consult with him?

Mr. Chun: I don't know what date you want him to come back.

Mr. Morimoto: If you consult with him and find out what his available dates are, then we can, perhaps, come to decision on this matter.

Mr. Trask: And again, I just...I maintain...for the record, Mauna Kea Trask, County Attorney. The rules provide for witnesses to provide a written declaration. The written declaration being discussed that was submitted by Ernie Barrera was part of our motion in opposition, so we believe that that was directly adhering to the rules; there was no surprise thereon. If it's...we can save the entire thing if you just...if I knew that he was coming, I could ask what was he going to testify about, and we could've talked about that. If I know what he's going to say, well even better yet, he can submit it to you, you can receive it, and then we can just have a battle of the decks. It doesn't even need to go. I just...again, I feel like I'm not able to accurately represent...I mean, adequately represent my client. I just feel a due process fairness, as an attorney, I can't advocate this way. I'll just leave it at that. I don't want to get any more emotional about it.

Mr. Chun: If I may, Mr. Chair?

Chair Mahoney: Yes, Mr. Chun.

Mr. Chun: In discussion with the counsels of the other parties here, they're urging my clients and myself to just agree to just continue this whole matter at one time, and then work on the date for one time (inaudible). Based upon discussions with counsel, we would agree to just having...just continue the...as Mr. Trask has requested, just to continue this whole hearing at a date when everybody can make it, at which we don't know yet, but we would agree to that.

Mr. Trask: And I'll warm with the Commission that I will clearly articulate and try to better understand everything so you don't get...I don't get caught by surprise again and you don't get caught by surprise again, and so for that, I apologize. Thank you.

Mr. Edwards: And the other thing that I (inaudible)...may I speak?

Chair Mahoney: Yes, please. State your name again, please.

Mr. Edwards: Barry Edwards, again.

Chair Mahoney: Thank you.

Mr. Edwards: We can exchange witness lists before the next proceeding. I have absolute no problem with that being established by the Commission, or we'll agree to it. It won't be an issue.

Chair Mahoney: Okay. Thank you.

Mr. Morimoto: Thank you.

Chair Mahoney: Appreciate that.

Mr. Chun: If we can just get an understanding of the timing, you know, then I can go back...like I said, I don't have a problem of...I mean, I think he will. It's just I know he is...we need to just schedule timing. Were we looking at, like, January, February, or...?

Mr. Morimoto: We can just call him back in here and we can ask him...you can ask him about his schedule, and we can try to work around his.

Mr. Chun: I don't know what the Commission's timing was going to be, so that's my only question.

Mr. Trask: Prior in...currently, the case has been on hold, but in the Guyer Contested Case, sometimes we have done scheduling via emails if we don't have our calendars readily available. So if we could do that with a delegate from the Commission, Boards or Commissions, and definitely between the parties; we have all our email addresses.

Mr. Chun: If you want to know now, I can...if you take a 5...2-minute recess.

Chair Mahoney: Could we take a recess? Yeah, for five (5) minutes.

The Commission recessed this portion of the meeting at 1:42 p.m.

The Commission reconvened this portion of the meeting at 1:49 p.m.

Chair Mahoney: Call the hearing back to order. Have we worked on some dates?

Mr. Chun: Go ahead.

Mr. Trask: If I may, Chair?

Chair Mahoney: Yes.

Mr. Trask: The parties' counsels have been speaking. We've agreed, with your Commission's permission, we can work this out on email and get back to, you know, your Commission Clerk and let you know where our schedules end up. I think that would be the best.

Chair Mahoney: Okay. So that would be in writing to the Clerk?

Mr. Trask: Correct.

Chair Mahoney: Okay.

Mr. Trask: And we can do it via stipulation. I believe, too, we'll work with counsel to do a stipulation for procedure, a stipulation for a next date, and exchange witness lists as well. We're happy to do that.

Chair Mahoney: Okay.

Mr. Chun: Yeah. With the intervenors, too.

Mr. Trask: With the intervenors as well, correct.

Chair Mahoney: Okay. Alright. That sounds reasonable on everyone's part. Thank you. Okay, so we'd have a motion to accept the parties...post schedule?

Mr. Trask: Yeah.

Mr. Ho: To accept the schedule?

Chair Mahoney: Yeah. Let's see how we word it correctly. Make a motion to...move to accept the parties' schedule and it will be done in writing to the Commission.

Ms. Nogami Streufert: To include...

Chair Mahoney: Yeah.

Ms. Nogami Streufert: The witness list.

Chair Mahoney: Yeah.

Mr. Katayama: No, we're going to just adjourn the hearings, right?

Mr. Trask: Wait. I think instead of adjourning we could continue because adjourning means you end it.

Chair Mahoney: Just continue? Okay.

Mr. Katayama: Until further notice.

Chair Mahoney: So we just move to continue, then. Alright, move to continue until further notice. That's what the motion could be on the floor if someone would so make that.

Mr. Keawe: I move to continue when we get further notice on dates for this particular issue.

Chair Mahoney: Okay. I'll take that. Is there a second?

Ms. Nogami Streufert: Second.

Chair Mahoney: It's been moved and seconded. Any discussion? Hearing none.

Mr. Katayama: Prior to that schedule on the next meeting, will we have the materials...the stipulated materials that were verbally approved by this Commission? Can we get that?

Mr. Edwards: You will, sir.

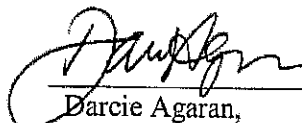
Mr. Katayama: Thank you.

Mr. Trask: Correct.

Chair Mahoney: Okay. Any further discussion? Hearing none. All in favor say aye.
(Unanimous voice vote) Opposed? (None) Motion carried 5:0. Thank you.

At 1:52 p.m., the Commission moved to continue the hearing on a date to be determined.

Respectfully submitted by:


Darcie Agaran,
Commission Support Clerk

() Approved as circulated (add date of meeting approval)

() Approved as amended. See minutes of _____ meeting.